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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT.

BRIEF OF PETITIONER.

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KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT.

The above entitled cause is now before this Honorable Court on writ of certiorari granted November 21, 1932.

BRIEF OF PETITIONER.

Statement of Case.

This case arises under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (U. S. C., Title 33, Chap. 18), made applicable to employees in certain employments in the

District of Columbia by the Act of May 17, 1928 (D. C. Code, Title 19, Chap. 2), which will hereinafter be referred to as the compensation law.

Karl F. Voehl, the petitioner herein, while in the employ of the National Electrical Supply Company of Washington, D. C., on Sunday, April 6, 1930, at about 8:30 a. m., sustained personal injuries resulting in permanent total disability to him, by reason of an automobile accident which occurred while he was en route from his home to his employer's place of business located at 1330 New York Avenue, N. W., in the city of Washington, D. C. By reason of the exigencies of his employment it was necessary for him to proceed from his home to his employer's premises for the purpose of removing an unusual accumulation of empty refrigerator crates and other debris at the employer's warehouse, in order to comply with the local fire regulations and to have the premises clean and in proper order for the usual inspection thereof by the employer the following day.

The employee's duties related to the storage, shipping and maintenance of the employer's electric refrigerator business and warehouse. Mr. Voehl's ordinary duties required him to report at his employer's premises during the regular week days, when his hours of service were fixed from 7:30 a. m. to 5:30 p. m. In addition to his regular week day employment for the employer Mr. Voehl was required to perform duties outside of the regular hours stated. These duties consisted of, first, the maintenance of a refrigerator service to customers of the employer at any hour of the day

or night, whenever so required or necessary, and the employer paid for the maintenance of a telephone in Mr. Voehl's home for the purpose of facilitating this service. Secondly, Mr. Voehl was required to perform service at his employer's place of business at any time whenever directed to do so or whenever Mr. Voehl deemed it necessary in his supervisory capacity. He also performed other duties for the employer at the employer's premises whenever such occasion arose, on work days before or after his usual working hours or on Sundays, such duties being in line with his general employment.

Mr. Voehl received pay from his employer for such overtime services as described at the rate of 75 cents per hour, and mileage for the use of his own automobile at the rate of five cents per mile. This additional pay and mileage were allowed and calculated *from the time the employee left his home until his return thereto* following the completion of the duty.

On the day of the accident, which was Sunday, Mr. Voehl found it necessary by reason of the exigencies of his employment to proceed over the customary route from his home to the warehouse of the employer, where he was going directly to clean the warehouse and to remove a large accumulation of empty refrigerator crates and other debris. It was necessary that he perform this mission in order to have the premises in order for inspection on the next day. The debris which had accumulated at the warehouse by reason of an unusual congestion, due to the press of business on the preceding Saturday, had not been removed.

Mr. Voehl was accompanied by one Hugh L. Finnegan, his brother-in-law, who had accompanied the employee for the sole purpose of assisting in removing from the employer's premises a truck load of ashes in cans which were too heavy for one person to lift. The ashes were to be used by Mr. Voehl for his personal needs in filling in depressions in the roadway in front of his home. The testimony in the case shows conclusively that the primary and major purpose of the trip on this particular Sunday morning was to clean the warehouse and to remove all the debris. The removal of the ashes, as shown by the evidence, was a secondary matter which was to be accomplished *after the work in the warehouse had been completed.* While on the direct route from his home to his employer's premises the automobile which Mr. Voehl was operating became unmanageable due to some mechanical defect or road condition and the car overturned, with the result that Mr. Voehl sustained a fracture of the spine with complete paralysis below the lumbar region. It appears that this disability is incurable and that Mr. Voehl will be permanently and totally disabled for life.

Subsequent to his injury, Mr. Voehl filed a claim for compensation on October 30, 1930, with R. J. Hoage, deputy commissioner for the District of Columbia, United States Employees' Compensation Commission. His claim was controverted by the insurance carrier representing the employer, which based its defense to the claim on the ground that the injury did not "arise out of and in the course of employment." A hearing was held on December 11, 1930, before the deputy commissioner, who thereafter filed a compensation order

pursuant to the compensation law on January 8, 1931, awarding compensation to Mr. Voehl for the disability which he had sustained. On February 5, 1931, the insurance carrier applied for a *statutory review* of the compensation order to the Supreme Court of the District of Columbia, under the provisions of section 21 (*b*) of the Longshoremen's Act. This section limits such review to the determination whether the compensation order is "not in accordance with law."

The Supreme Court of the District of Columbia, by decree filed April 4, 1931, affirmed the said compensation order and the carrier then appealed to the Court of Appeals of the District of Columbia, where the decree of the lower court was reversed by judgment entered May 9, 1932, setting aside the said compensation order.

Applications were made both to the Supreme Court of the District of Columbia and to the Court of Appeals to stay compensation payments during said proceedings and both courts denied the applications.

It is from the final judgment of the Court of Appeals of the District of Columbia in reversing the decision of the Supreme Court of the District of Columbia that writ of certiorari was applied for and granted.

Question Presented.

Did the Court of Appeals of the District of Columbia err in delving into the evidence to reweigh the evidence presented before the deputy commissioner and drawing an inference therefrom contrary to that drawn by the deputy commissioner, in the face of substantial evi-

dence in the record in support of the findings of fact contained in the compensation order, and thereafter setting aside the said order?

Specifications of Error.

1. The court below erred in reweighing the evidence taken at the compensation hearing before Robert J. Hoage, deputy commissioner, on the question whether the employee's injury "arose out of and in the course of the employment" and then arriving at a conclusion upon the *facts* in the case diametrically *opposite* to that reached by the deputy commissioner in his compensation order of January 8, 1931, where the deputy commissioner's findings of fact therein are supported by substantial evidence.

2. The Court of Appeals of the District of Columbia erred in refusing to follow the rule of law in such cases, which has been laid down by this Honorable Court in the case of *Crowell, Deputy Commissioner* v. *Benson*, 285 U. S. 22, 52 S. C. R. 285, and followed with summary judgment by this Honorable Court in the case of *L'Hote* v. *Crowell, Deputy Commissioner*, 286 U. S. 528, 52 S. C. R. 499, on the same compensation law now involved.

Statutes Involved.

The following excerpts from the compensation law are given for the convenience and information of the court:

> Section 2. (2) "The term 'injury' means accidental injury or death arising out of and in the

course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee beause of his employment." (Sec. 902 (2) U. S. C. Title 33, Chap. 18.)

Section 21. (*b*) "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage." (Sec. 921 (*b*) U. S. C. Title 33, Chap. 18.)

Argument.

1. The Court of Appeals of the District of Columbia in its opinion in the case at bar stated that "the sole question before the court, therefore, is whether or not Voehl's injury arose out of and in the course of his employment" (R. 71).

The court below with reference to this question attempted to turn into a question of law a matter which your petitioner respectfully asserts is a *question of fact*. The question of fact involved is this—what was the purpose and object that Mr. Voehl had in mind when he proceeded from his home to his employer's place of business on Sunday, April 6, 1930? Your petitioner respectfully asserts that the deputy commissioner's finding of fact to the effect that Mr. Voehl was proceeding to his place of employment to perform a mission for his employer is supported by substantial evidence. Conversely, if the evidence did not show that Mr. Voehl was proceeding on a mission for his employer but upon a *mission of his own* to obtain a load of ashes, your petitioner is in full agreement with the insurance carrier's contention that the injury did not arise out of and in the course of employment.

For the information and convenience of the court the following excerpts are taken from the compensation order filed January 8, 1931, by the deputy commissioner, relative to the principal question in this case; namely, the purpose of Mr. Voehl's trip to his employer's premises:

"That on said date the claimant herein, while en route to the plant of the employer above named for the purpose of cleaning the warehouse in the refrigerating department, sustained personal injury which arose out of and occurred in the course of his employment and resulted in his disability; * * * that on Sunday, April 6, 1930, the claimant determined that it was necessary that he should go to the warehouse of the employer to clean up certain trash that was in and around the building, part of which duty he was held entirely responsible for and part of which was a matter of his own discretion; that the object of his trip on that date was to clean up the warehouse, which was littered with trash from unpacking cases, to have it in readiness for regular Monday morning inspection; that in addition to this duty the claimant was expecting to haul home a load of ashes to be dumped in the public highway in front of his house, and to take away some of the trash which was of necessity to be removed from the building * * *" (R. 53, 54).

The Court of Appeals of the District of Columbia in its opinion of May 9, 1932, with respect to the question of fact involved, states:

"It further appears, from the evidence, that on the morning of the accident Voehl, in company with his brother-in-law, was on the way from his home to the warehouse of his employer to get a load of ashes which they planned to dump in a mud hole in the road near Voehl's residence. The evidence discloses beyond dispute that the main object of the trip was to obtain the load of ashes. It is, however, claimed by

> Voehl that it was his intention when he reached the warehouse to clean up some trash which had accumulated there. * * * The evidence clearly established, we think, that the purpose of the trip on the Sunday morning of the accident was to procure a load of ashes for Voehl's personal use, and that if in fact he intended to remove some trash, this was merely incidental to the general purpose for which the trip was made. Voehl at the time and place of the injury was not performing any duty in the course of his employment" (R. 69, 70-72).
>
> * * * * * * *
>
> "To an employee injured as was Voehl in this case there is strong inducement to claim that he was on his way to perform some service incidental to his employment, but the claim advanced is in fact totally foreign to the motive which prompted the trip" (R. 73).

It will be seen by comparing the findings of fact of the deputy commissioner with the statement of *facts* by the court it is obvious that the court has reached a fact conclusion from the evidence diametrically *opposite* to the fact findings of the deputy commissioner. This your petitioner respectfully contends in the face of this record is error.

This Honorable Court in the case of *Crowell, Deputy Commissioner* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, specifically recognizes the finality of fact findings of a deputy commissioner, where supported by evidence. In the Benson case the court passed on the very Act now under consideration, in so far as it applied to the

admiralty and maritime jurisdiction of the United States. Under section 21 (*b*) of the Longshoremen's Act, quoted above, the Supreme Court of the District of Columbia had before it the present case upon *review*, and its inquiry under the law and the decisions of this Honorable Court was limited to the determination whether the compensation order was "not in accordance with law." Your petitioner respectfully states that in accordance with the decisions of this Honorable Court above and hereinafter referred to, and the law generally, which is illustrated in innumerable cases cited in the American Digest System, Key number 417 (7) under "Master and Servant", the rule is laid down that in *review* of the action of a compensation board or administrator the court has no authority (with the exceptions noted in the *Crowell* v. *Benson* case, *supra*, not here applicable for the reason hereinafter stated) to reweigh or redetermine questions of fact. The same rule does not authorize the court to substitute its judgment for that of the trial deputy commissioner on questions of fact. In a judicial review your petitioner contends that the court is limited on fact questions involved to the determination whether there existed before the deputy commissioner any substantial evidence in support of his findings of fact. If the findings are so supported by evidence they become final and conclusive upon the court. The court, however, may in proper cases find an absolute lack of evidence to support the findings of fact and may in such cases hold that the compensation orders being unsupported by evidence are "not in accordance with law", or, where the findings of the deputy com-

missioner are arbitrary and unreasonable, by being opposed to the uncontradicted testimony susceptible of only one inference, such arbitrary or capricious action might warrant a compensation order being held to be "not in accordance with law."

In *Crowell* v. *Benson, supra,* this Honorable Court laid down the rule as follows:

> "Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act the findings of the deputy commissioner, supported by evidence and within the scope of his authority, *shall be final.*" (Italics supplied.)

This rule of finality has been reaffirmed by this Honorable Court in the recent case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499, also involving the Longshoremen's Act. in the *L'Hote* case this court reversed the judgment of the circuit court of appeals because it affirmed the district court in retrying the facts relative to the dependency of a compensation claimant, and directed the lower court to affirm the award of the deputy commissioner. This Honorable Court in effect in that case held that the findings of fact of a deputy commissioner relative to the facts of dependency shall be regarded as final and conclusive. Moreover, in the case of *Crowell* v. *Benson, supra,* this Honorable Court has already signified that findings of fact in a situation such as is involved in the present case are for the

determination of the deputy commissioner. The pertinent language of the opinion of the Chief Justice reads:

> "The Act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the *circumstances*, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards." (Italics supplied; 285 U. S. 54.)

In addition to the two cases cited above the court's attention is respectfully directed to the case of *Dahlstrom Metallic Door Company* v. *Industrial Board of New York*, affirming 231 App. Div., as affirmed by 256 N. Y. 199, Per Curiam report in 284 U. S. 594, wherein this Honorable Court followed the principle set forth in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, the principle being that in compensation cases the findings of fact of a deputy commissioner or board are to be regarded as final and conclusive upon the court on review where supported by any substantial evidence, and that the court has no independent authority to reweigh the evidence or try the case *de novo*.

It is noted that in *Crowell* v. *Benson*, *supra*, this Honorable Court stated in substance that the findings of fact of the deputy commissioner under the Longshoremen's Act are final and conclusive upon the court on review of a compensation order in every case with the following exceptions: that where fundamental or jurisdictional questions are involved the findings of fact of the deputy commissioner are not final and that

the district court may independently inquire into the facts involved in these fundamental or jurisdictional questions by a trial *de novo* of the facts.

This Honorable Court in its opinion held that the "fundamental" or "jurisdictional" questions are limited to (1) whether the injury occurred upon the navigable waters of the United States, and (2) whether the relationship of master and servant exists. These factors must exist as "a condition precedent to the operation of the statutory scheme."

Applying the *Crowell* v. *Benson* case, *supra,* to the present case, your petitioner respectfully states that the general rule therein expressed, and heretofore recognized in the two cases preceding this case above cited, and the *L'Hote* v. *Crowell* case, *supra,* following it, relative to the finality of findings of fact of a deputy commissioner, applies with equal force to the present case.

The exception to the general rule given in the *Crowell-Benson* case; namely, the right of trial *de novo* on the question of relationship of master and servant, and whether injury occurred on the navigable waters, is clearly not applicable in the District of Columbia. The right of trial *de novo* in these instances is necessary to enable the *constitutional* Federal district courts to exercise their independent jurisdictions given to them directly by the Constitution which vests in such courts independent jurisdiction over matters that fall within the admiralty and maritime jurisdiction of the United States (Const. Art. III, sec. 2; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 138), and the general au-

thority of Congress does not extend to deprive these courts of their inherent prerogative to hear *de novo* the facts upon which their jurisdiction rests.

Congress in legislating for the District of Columbia can do so without restriction, except in so far as the fundamental rights of citizens generally are concerned. Congress is not required to stop to examine the Constitution to determine whether or not it is transgressing upon the authority of a constitutional court where legislating concerning local affairs in the District of Columbia. Therefore, in pursuance of this plenary jurisdiction conferred upon it Congress has seen fit to create local *legislative* courts, of which the Supreme Court of the District of Columbia and the Court of Appeals, D. C., when passing upon matters of local concern, are representative.

The question whether the Supreme Court of the District of Columbia is a legislative court created by Congress, or a constitutional court within the meaning of the Federal Constitution was definitely decided in the case of *Ex Parte Bakelite Corporation,* 279 U. S. 438 (1929), in which this Court said:

> "These courts (referring to courts of the District of Columbia) this Court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of government of the United States, are *legislative* rather than *constitutional* courts." (Emphasis supplied.)

In *Atlantic Cleaners and Dyers, Inc.,* v. *United States,* 52 S. C. R. 607, 609, decided May 23, 1932, Mr.

Justice Sutherland on commenting upon the power of Congress to legislate for the District of Columbia, said:

> "The power exercised, and which gives vitality to the provision, is the plenary power to legislate for the District of Columbia, conferred by Art. 1, sec. 8, cl. 17 of the Constitution. Under that clause Congress possesses not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a State in dealing with its affairs, so long as other provisions of the Constitution are not infringed."

It follows therefore that the general rule expressed in *Crowell* v. *Benson, supra,* to the effect that findings of fact of a deputy commissioner are *final* and *conclusive* upon the court in review proceedings is applicable to the District of Columbia and that the right of trial *de novo* given only in cases where fundamental or jurisdictional questions are involved (limited to (1) master and servant relationship, and (2) whether injury occurred on the navigable waters) is limited and can apply only to cases arising under the admiralty and maritime jurisdiction of the United States before *constitutional* Federal courts. The reason for the right to a trial *de novo* in admiralty matters does not exist with respect to cases in the District of Columbia. Therefore, the final conclusion, upon review of the law as expressed by this Honorable Court and the many inferior courts in the United States, is that the Congress has placed in the deputy commissioner for the District of Columbia the authority to pass *finally* on *all* questions of fact, leaving questions of law for the court to decide. The courts, upon review, are required by this rule of

law to give conclusive effect to all fact findings where supported by any substantial evidence.

Based upon the rule of law above expressed your petitioner contends that all he is required to show to the court upon review of a compensation order is that there is some substantial evidence to support the findings of fact of the deputy commissioner.

For the purpose of showing that there is evidence in support of the findings of fact of the deputy commissioner contained in the transcript of record without attempting to review the evidence as a whole your petitioner sets forth below some brief excerpts from the record:

Statement by Mr. Voehl:

> "I took care of the building in accordance with the general order I had from Mr. McCrea, the general manager of the refrigeration department, that trash must not be allowed to accumulate. It was in carrying out this order that I governed my actions. The manager would inspect the warehouse every Monday morning in order to see that it was free of all trash. I naturally did my utmost to have the building clean for inspection. It was unusually busy at the building at the time I sustained my accident as we had to handle about 20 to 30 refrigerators per day. This of course caused trash to accumulate faster, making it necessary for me to come down to the building the Sunday of the accident." (R. 49-50.)

Statement by Mr. McCrea, general manager:

> "Mr. Voehl had charge, first of all, of the maintenance and operation of the warehouse,

and, second, he was charged with seeing that service on refrigerators in operation in customers' homes, etc., was maintained. We call it 'Head of the products' division' " (R. 22).

"Mr. Voehl supervised the unloading of the refrigerator units, refrigerators, placing them in a warehouse, unpacking, examination before delivery, delivery, and installation in customers' homes" (R. 22).

"* * * If there was anything that needed to be done we could absolutely rely that he would do it and, as far as specific or detailed instructions go, it is my own policy not to give men specific instructions but to let the men do the job and I look for the results more than what we exactly tell them to do" (R. 24).

"* * * I know that the business for the first week in April was approximately three times what it had been for the weeks preceding it, immediately preceding that; in the three days prior to the date of accident we had unpacked a total of some sixty refrigerators. Now that exact figure is subject to correction, that is merely approximate. Now, sixty refrigerators and sixty machines produce 120 crates, and a refrigerator is packed in a large heavy board crate, or were at that time; I know from previous experience that the unpacking of that amount of material and the delivering of that amount of material is always attended by a large accumulation of trash and litter which must be cleared up" (R. 26).

"I do know that two or three days prior to the accident I had called his attention to the necessity of keeping it better cleared up" (R. 26).

"* * * Well, Voehl was one of the most conscientious employees I have ever known. Naturally, he could not be with us sixteen years without having been so and we gave him the job and expected him to do it."

"* * * I never questioned Voehl's overtime one bit. I have checked it enough to know that he was honest in his statements and if he put in an overtime charge for five hours or six hours or three hours that week, I am certain it was correct" (R. 24).

Mr. Finnegan testified:

"Well, he came over to the house that Sunday morning and told me he would like me to go with him to the warehouse, that he hated to bother me so early in the morning but that he had to move the ashes there and needed help for that but he could clean up the warehouse, he said, and he said he did not need any help for that. That is the reason he asked me to accompany him" (R. 14).

At this juncture reference is made to the statement in the opinion of the Court of Appeals of the District of Columbia to the effect that an employee injured as was Voehl there is strong inducement to claim that he was on his way to perform some service incidental to his employment. It is respectfully called to the Court's attention that there is nothing whatever in this record (nor has the insurance carrier urged the matter) which demonstrates bad faith on the part of the petitioner. There is not a suggestion in the record that this was anything but a *bona fide* claim. Mr. Voehl was very frank in his statement as to the pur-

pose of the trip in that he did refer to his intentions to perform a personal errand after he had completed his duties for his employer. His employer did not question his integrity as may be seen from the excerpt of testimony above quoted.

In conclusion on this point your petitioner respectfully states (1) that where there is any evidence to support the findings of fact of the deputy commissioner under the rule expressed above, the findings of fact should be regarded as final and conclusive, (2) that there is evidence in the record that the purpose of Mr. Voehl's trip to his employer's premises on the day of his injury was to perform a duty for his employer entirely within the scope of his employment, and (3) under syllogistic reasoning this Honorable Court should hold that the deputy commissioner's findings of fact on this point are conclusive and final.

It suffices to say that the reversal of the Supreme Court of the District of Columbia by the Court of Appeals appears to be principally based upon the gratuitous finding by the appellate court, which your petitioner maintains is not supported by the evidence, to the effect that Voehl was not going upon a mission for his employer, whereas the evidence clearly shows that he was on such mission.

2. As a proposition of law, injuries sustained by employees while en route to their regular place of employment during the regular week day service, where they have specific places to report for duty, at specific times, are not within the purview of the compensation law for injuries sustained while so en route. How-

ever, this general rule has its many exceptions, one of which has already appeared before this Honorable Court in workmen's compensation cases.

This point of law was discussed in the opinion of the court below but was apparently not necessary for the court's consideration in reaching its conclusion in this case, for the reason that the court reached a *fact conclusion* that Voehl was on a personal errand, hence the rule of law in cases where an employee is injured en route on a mission for his master was neither apparent nor a necessary question involved for the determination of the present case. However, since your petitioner feels that this Honorable Court may have this further point to consider, should it find that the deputy commissioner's conclusions of fact should be supported, it is deemed advisable to make reference thereto.

Some of the exceptions to the general rule that an employee injured while on his way to work is not within the purview of the compensation law, are set forth below. It is not practical to classify these exceptions into any general class or classes, since fact situations from time to time arise which require the modification or extension of the rule covering these exceptions, and each case more or less depends upon the merits of its own facts.

(*a*) Where an employee while en route to his place of employment to begin his day's work is required to pass across a dangerous approach to his employer's premises, he may be compensated for injuries sustained en route to work. This principle is illustrated

in *Cudahy Packing Company* v. *Parramore*, 263 U. S. 418, 44 S. C. R. 53, where an employee had to cross railroad tracks outside of, but adjacent to, his employer's premises. In that case it was held that an injury sustained while en route to work under such circumstances was compensable. In another case involving this similar principle, namely *Bountiful Brick Company* v. *Giles*, 276 U. S. 154, this court held that the compensation law applied to the case of an employee who, while on his way to work, "was killed by a locomotive on a public crossing on a railroad adjacent to his employer's factory."

(*b*) Where the employee is furnished transportation at the expense of the employer, he is under the protection of the compensation law at all times going from home to work or returning home from work while in such conveyance. Thus in *Swanson* v. *Lathem & Crane* (Conn. 1917), 101 Atl. 492, where one of the workmen had an automobile in which he transported other workmen under an arrangement with the employer, to and from work, and the workmen were killed when the automobile collided with a train while returning from work one evening it was held that death arose out of and in the course of employment.

In *Littlefield's* case (Maine 1927), 136 Atl. 724, where a carpenter agreed with his employer to transport fellow workmen to and from work, injuries sustained in the overturning of the automobile while en route home arose out of and in the course of the carpenters' employment.

In *Scalia* v. *American Sumatra Tobacco Company*, 105 Atl. 346, the court states the following rule:

> "That the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right permitted, to use by virtue of that contract."

See also *State, ex rel, McCarthy Brothers Company* v. *Circuit Court of Hennepin County*, 169 N. W. 274; *Rock County* v. *Industrial Commission*, 200 N. W. 657 (Wis. 1924); *Vogel's* case, *Duerte's* case, *Antonio's* case (Mass. 1926), 153 N. E. 175; *Jett* v. *Turner* (1926), Supreme Court of Alabama (1, Div. 418), 215 Ala. 352.

(*c*) Where the employee is paid from the time he leaves home until his return thereto he is entitled to compensation for injuries sustained from the moment he leaves his home until he returns thereto.

In *Cymbor* v. *Binder Coal Company* (Pa. 1926), 132 Atl. 363, the employee was required to make nightly trips to his employer's mine in order to start the pumps so that water in the mine would be removed when work was resumed. The employee lived about 1,200 feet from the mine and walked to and from the mine on the tracks of the Pennsylvania Railroad Company. About ten o'clock in the evening employee took his lantern, went from his home to the mine, started

the pumps, and while returning on the tracks was killed by a railroad engine. He was paid by the hour for his work in the mine during the day and received extra pay for starting the pumps at night. For the latter he kept his own time and turned it in every two weeks, it being inferred that he charged the actual time used from his home on the errand until his return thereto. It was held that he was in his master's business not only while starting the pumps but while travelling to and from home.

In *Ohmen* v. *Adams Brothers* (Conn. 1929), 146 Atl. 825, an employee lived in a town some distance from his place of employment and was injured while returning to work after having received permission to go to his home town to vote. His pay started as usual at 8 a. m., which was the hour his employment usually began, while the polls did not open until 9 a. m. He was proceeding en route to his place of employment and had reached a point about 5 miles from his employer's premises at 9:20 a. m. when he was injured. The injury was held compensable since the employee was in a pay status at the time his injury was received.

(*d*) Where an employee sets about on a special errand for the employer he is entitled to protection of the compensation law from the time he leaves his home until his return thereto regardless of whether or not he is paid extra for such special service.

In *Consolidated Underwriters* v. *Breedlove*, 265 S. W. 128 (Tex. 1924), a mechanic subject to call at any time who was sent out to see about a battery and at the same time on his way back stopped for lunch and

was injured after lunch while on his way to his employer's business place, was held within the compensation law.

In *Reese* v. *National Surety Company of New York* (Minn. 1925), 203 N. W. 442, the employee was required to go about the city after office hours. One night he was sent upon a special errand which required his presence several miles from the office until 10 o'clock at night. He was returning to his home when injured. It was held that under the showing he was at the time of his injuries where his duties called him and therefore entitled to compensation for the injuries sustained.

In *State Compensation Insurance Fund* v. *Industrial Accident Commission of California* (1928), 264 Pac. 514, the decedent was an outside salesman and he was required to report each morning for duty at the company store. On the day of his death he was instructed by one of the company's executives to return to the store that night after dinner to unlock the door to admit an electrician. In accordance with his usual custom decedent left the store on the date mentioned at about 5 o'clock, went home to his dinner, and returned to the store, allowing the electrician to enter, where he remained from 7 until 10 p. m. He then locked the store, boarded a street car, and on his way home, while transferring from one car to another, slipped and fell on the street sustaining injuries from which he died. The court in sustaining the award in part states:

> "The rule generally known as the going and coming rule has been considered and applied by

this court in numerous cases where the person injured was employed to perform service at or in a particular plant or upon particular premises, and the injury claimed to be compensable was inflicted while he was going to or returning from his place of employment or where the employee had left the place of employment on an errand personal to himself. The general rule subject to many exceptions, however, is that injuries inflicted under the foregoing circumstances are not compensable. * * * As the Commission held, the evidence here proves that this was not the ordinary case of an employee being injured while following the usual custom of going to or coming from the place where he works; on the contrary it shows beyond doubt that decedent was injured while returning from a special errand which he was performing under the direction of his employer and which required him to leave his home at night after regular working hours and called for a service outside of his regular duties as a salesman, the sole purpose of which was to help his employer in the latter's business; and it was because of the relationship of employer and employee that one requested the service and the other rendered it."

In *Merriman* v. *Manning, Maxwell & Moore, Inc.* (Mich. 1930), 232 N. W. 409, a sales engineer was injured while he was on his way to his employer's office on Sunday morning. His superior on a previous day had instructed the employee to meet him at the employer's office on the Sunday morning for conference with reference to a certain business trip. While on the way to the office from his home an accident occurred

resulting in the death of the sales engineer, which was held compensable. See also *Messer* v. *Manufacturers' Light & Heat Company* (Pa. 1919) 106 Atl. 85; *Maryland Casualty Company* v. *Long* (Tex. 1928) 9 S. W. (2d) 458.

(*e*) Where the employee has no fixed place of business such as a salesman, he is covered by the compensation law while en route from his home to his first customer or while en route from his last customer.

(*f*) Where an employee is obliged to make emergency calls or to perform service at his employer's place of business at times other than during the regular working hours, he is under the protection of the compensation law from the time he leaves home until his return thereto.

Thus, in *Linnane* v. *Ætna Brewing Company*, 99 Atl. 507, it was held that where an employee by reason of the terms of his employment is subject to emergency calls he is covered by the compensation act from the time he leaves home in response to such calls.

In *Gibbs* v. *Macey & Company*, 214 App. Div. 335; 242 N. Y. 551, a house detective for a large department store left her home on a Sunday morning and proceeded to court to attend trial of a shoplifting case. On her way back home a motorcycle ran her down, fracturing her wrist. The carrier for the employer contended that her work ended when she left the court. The appellate division affirmed the award, stating: "Of that journey to the court the homeward journey was a necessary counterpart." Upon further appeal

the New York Court of Appeals affirmed the appellate division without opinion.

In *Martin* v. *Card & Company*, 193 App. Div. 6, the employee whose business it was on Sundays to go to the employer's factory to look after fires, lights, etc., and to see that things were in working order for Monday, used his own personal car on a Sunday to go after a spark plug for his employer's truck. While cranking his own Ford car it back fired, causing fracture of the wrist. It was held, injury arose out of and in the course of employment since the use of his own car was in a job he started to do for his employer, to the employer's advantage with no pecuniary gain for himself.

In *Van Gee* v. *Courts*, 169 N. E. 370 (N. Y. Ct. of App. 1929), the employee failed to appear at the employer's plant in time to load his truck, due to the fact that he overslept. Employer's son took employer's automobile and drove to truck driver's home at 2 a. m. and was driving back to the plant with the employee when the accident occurred in which both were killed. It was held that the injury arose out of and in the course of employment. See also *Foggs* case, 132 Atl. 129. *MacClelland* v. *Dodge Bros.*, Vol. 11, N. Y. Industrial Bulletin, November, 1931, page 12, 233 App. Div. 504.

Many similar cases exemplifying the exceptions to the general rule above stated will be found in the American Digest System, "Master and Servant" key number 375 (2) "Injuries received while going to and from work."

In the following case, *Rawson's* case (Maine 1928) 140 Atl. 365, the court discusses the exceptions to the general rule herein mentioned:

> "This general rule is subject to certain definite classes of exceptions. They are well set forth in *Whitney* v. *Hazard Lead Works, et al.*, 136 Atl. 105. Four of them may be noted: (1) where the employment requires the employees to travel on the highway; (2) where the employer contracts to, and does, furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of the fireman; (4) where the employee is using the highway in doing something incidental to his employment with the knowledge and approval of the employer."

The evidence in the present case shows clearly that Mr. Voehl was allowed overtime pay at the rate of $.75 per hour and mileage at the rate of $.05 per mile *from the moment he left his home until his return thereto* (R. 23, 24, 35, 49). This allowance was not made in going to and from work during his regular weekday service (R. 36, 49). If he deemed it necessary to go to the warehouse on Sunday he was not required to obtain special authority to do so, and when he made such a trip, if in connection with his work and in the interest of his employer, he would receive overtime pay and mileage for the use of his automobile (R. 70). On Sunday, April 6, 1930, the record clearly shows that Mr. Voehl left his home for his place of employment on a mission for his master. Under the rule expressed in the exceptions above, he was on a

"duty status" from the moment he left his home. His services on that day were in the nature of a special errand to his employer's premises to perform a particular and necessary duty required by the exigencies of his employment, and as a consequence of special conditions arising on the employer's premises due to an unusually large accumulation of debris, which he was required to remove and clean away prior to inspection on the next day.

It is particularly in point to note the agreement between Mr. Voehl and his employer with respect to overtime pay and mileage referred to herein, to the effect that if he had completed the service or gone to his employer's premises on the day of injury he would have been entitled to put in a slip for overtime pay and mileage (R. 25). The fact that the injury took place within a few minutes after leaving his home was the occasion for not putting in such a slip for reimbursement.

The evidence in this case clearly indicates that the employer considered Mr. Voehl at the time of his injury was acting within the scope of his authority and entirely within the discretionary powers vested in him by the employer (R. 25), and that the injuries were sustained under circumstances unmistakable, showing that they arose out of and in the course of his employment. The insurance carrier in this case did not put on a single witness before the deputy commissioner.

In this connection it is desired to cite the following case, decided by the Supreme Judicial Court of Maine October 1, 1925:

> "Who better than the employer would know whether an employee is 'doing his regular work' at the time when the accidental injury occurred? Since the employer admits, and the Chairman of the Industrial Accident Commission has found, no fraud appearing, that the petitioner received his injury in the course of his employment, we are not disposed to differ from that admission and finding. *Beers'* Case, 130 A. 350." See also *Jessup* v. *Wrigley*, 250 N. Y. 563.

3. The respondent raised the contention below that this injury is not compensable because it arose out of a "traffic hazard."

At one time in the early administration of compensation laws in the various States there was adopted in some of the States what was then known as the "commonalty doctrine" in which the rule was followed that injuries occurring on public highways while the employee was in the course of his employment did not "arise out of the employment." This doctrine lead to so many injustices, particularly where employees perform no service except upon the public highways, that it has been repudiated in practically every State in the United States and in England.

In the administration of the District of Columbia Workmen's Compensation Act, which Act is an adaptation to the District of Columbia of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, the decisions in the State of New York from which our present Act was largely adopted are of especial force and value. In applying the law therefore to the present case the petitioner has sought particularly to

ascertain the construction placed on similar phraseology in the Act applicable in the State of New York.

That the old "commonalty doctrine" does not obtain in New York State, can readily be observed in the cases cited, and by consideration of innumerable cases decided by the New York Court of Appeals in the last twelve years. It can be stated that injuries resulting from traffic hazards, occurring on public highways, to employees in the course of their employment likewise "arise out of the employment".

Thus in *Katz* v. *Kadans & Company,* 232 N. Y. 420; 134 N. E. 330, the New York Court of Appeals held that the workmen's compensation act protects an employee passing along the streets when on his master's business if the work involves perils of street, strange, unanticipated, and infrequent though they may be, and injuries therefrom "arise out of the employment". See also *Roberts* v. *J. F. Newcomb & Co.* (N. Y. C. A. 1923) 234 N. Y. 553; 138 N. E. 443.

The rule is stated in the English case of *Dennis* v. *White & Co.,* 1917 A. C. 479, as follows:

> "If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle or on an omnibus or car and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment. The frequency or infrequency of the occasion on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment."

This matter has been passed upon by the Court of Appeals of the District of Columbia, in the very recent case of *New Amsterdam Casualty Co. v. Hoage, Deputy Commissioner*, 62 Fed. (2d) —, in a compensation case in which that court affirmed the award of the deputy commissioner, involving an accident occurring on the public highways. Mr. Chief Justice Martin in an opinion rendered November 28, 1932, states:

> "In the early administration of compensation laws the rule was often adopted that injuries occurring on the public highways due to traffic hazards did not 'arise out of' the workman's employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risks. This doctrine, however, has since been abandoned. It is now held by the greater weight of the authorities that if an employee in the course of his employment has to pass along the public streets and thereby sustains an accident by reason of the risks incident to the streets, the accident 'arises out of' as well as 'in the course of' his employment."

The Court of Appeals then cites *Schroeder & Daly Co.* v. *Industrial Commission of Wisconsin*, 169 Wisc. 567; *McCulloch* v. *Pittsburgh Plate Glass Co.*, 107 Conn. 164; *Hansen* v. *N. W. Fuel Co.*, 144 Minn. 105; *Porter Co.* v. *Industrial Commission*, 301 Ill. 76; *Morse* v. *Port Huron & D. R. Co.*, 251 Mich. 309; *Fiarenzo* v. *Richards & Co.*, 93 Conn. 581.

Conclusion.

In conclusion it is respectfully stated that the evidence presented before the deputy commissioner in the present case as reported in the transcript of testimony filed herein which has been made a part and parcel of the respondent's bill in Equity below, together with the compensation order complained of, shows unequivocally that Karl F. Voehl, the employee, when he received his injuries was engaged upon a mission for his employer on Sunday, April 6, 1930, in the nature of a special errand under general authority vested in him by his employer and under a general agreement with the employer with respect to overtime pay and mileage for the use of his own personal car, while engaged in this mission.

This proceeding was brought under Section 21(*b*) of the Longshoremen's Act as applied to the District of Columbia, upon an application for judicial review of the compensation order to determine whether it was "not in accordance with law". The insurance carrier in the lower court placed the whole case before the court upon his bill and the exhibits thereto annexed. The bill of complaint, with transcript of testimony and compensation order annexed, presented to the court the insurance carrier's case which made the bill subject to a motion to dismiss on the points involved; namely, whether there was any substantial evidence in that transcript of testimony, a part of the bill, to support the allegations of the bill or the findings of fact of the deputy commissioner, and such points of law as therein involved.

The question for the determination of this Honorable Court is whether there is any competent evidence to support the findings of fact of the deputy commissioner. Should the findings of fact of the deputy commissioner be found to be supported by the evidence then, under the ruling of this Honorable Court in *Crowell, Deputy Commissioner,* v. *Benson, supra,* and *L'Hote* v. *Crowell, Deputy Commissioner, supra,* they should be given the stamp of finality.

Your respondent respectfully contends that the Court of Appeals of the District of Columbia has made an independent inquiry into the facts concerning the *circumstances* of Mr. Voehl's trip on the day of his injury and has arrived at a *fact conclusion* that Mr. Voehl was not proceeding about his master's business and that therefore the injury did not arise out of and in the course of employment. The natural inference is that the court below has reweighed the evidence in this case. The conclusion which it has reached on the facts is not supported by the record.

At this juncture it is desired to respectfully direct the Court's attention to Section 20 of the Longshoremen's Act which provides in part as follows:

> "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed in the absence of substantial evidence to the contrary— (*a*) That the claim comes within the provisions of this Act."

The insurance carrier, appellant below, not only failed to offer any evidence tending to rebut the claim of Mr. Voehl but fell entirely short of offering any "substantial" evidence to the contrary.

Your petitioner, therefore, respectfully submits that the Court of Appeals of the District of Columbia in the above entitled cause was in error and that its decision be reversed and the original decree entered by the Supreme Court of the District of Columbia be affirmed with costs in this behalf incurred.

Respectfully submitted,

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